SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969.

No. 225.

WILLIAM MARCUS ET AL.,
Appellants,

vs.

SEARCH WARRANT OF PROPERTY AT 104 EAST TENTH STREET, KANSAS CITY, MISSOURI, ET AL.,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF MISSOURI, EN BANC.

BRIEF FOR THE APPELLEES.

THOMAS F. EAGLETON,
Attorney General,
FRED L. HOWARD,
Assistant Attorney General,
JOHN C. BAUMAN,
Assistant Attorney General,
Supreme Court Building,
Jefferson City, Missouri,
Attorneys for Appellees.

E. L. MENDENHALL, Inc., 1108 Oak Street, Kansas City 6, Mo., HArrison 1-2030

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SUMMARY OF ARGUMENT.

I.

This Court should not retain jurisdiction or should affirm the decision of the Supreme Court of Missouri, for the reason that the statutory scheme here in question is in all essential elements constitutionally similar to the statutory scheme of New York approved by this Court in the case of **Kingsley Books v. Brown**, 354 U.S. 436, 1 L. Ed. 2d 1469, 77 S. Ct. 1325.

II.

The application of the Missouri statutes authorizing the seizure of obscene literature and an expeditious judicial determination of the fact issue of whether or not such publications are obscene, does not constitute a previous restraint upon freedom of speech or press and appellants' constitutional rights are in no way invaded by such proceedings.

III.

The issue of whether or not the publications in question are obscene has not been presented to this Court for review and, therefore, appellants' complaints in Point III of their brief as to the propriety of the test for obscenity used by the trial court is not before this Court for determination. In any event, the Supreme Court of Missouri, by its construction of its previous holdings, pointed out that the test used was in fact proper and in accordance with the opinion of this Court in **Roth v. United States,** 354 U.S. 376, 1 L. Ed. 2d 1498, 77 S. Ct. 1304. In any event, the Supreme Court of Missouri itself passed upon the fact issue of obscenity and had the exhibits before it. It applied the test for obscenity approved in the **Roth** case, supra, and appellants cannot now be heard to complain on such score.

ARGUMENT.

I.

This Court should not retain jurisdiction of this appeal because of the lack of any substantial federal question or the decision of the Supreme Court of Missouri should be affirmed on the authority of Kingsley Books v. Brown, 354 U.S. 436, 1 L. Ed. 2d 1469, 77 S. Ct. 1325, and Roth v. United States, 354 U.S. 476, 1 L. Ed. 2d 1498, 77 S. Ct. 1304.

In the case at bar we are dealing with obscene publications; books, magazines, pamphlets and photographs. The issue of whether or not these publications are in fact obscene was presented to the trial court and to the Supreme Court of Missouri, and these courts found the issue of obscenity adversely to the contentions of appellants. The appellants have expressly refrained from presenting this fact issue of obscenity to this Court. See appellants' brief, page 3, footnote 1. Thus, for the purposes of this appeal, we can consider that the fact issue as to obscenity has been settled and that the publications in question are in fact obscene.

Both the trial court and the Supreme Court of Missouri had these publications before them and carefully examined each of the publications and, after applying the tests for obscenity as approved by the Supreme Court of the United States, determined that the publications in question, and each of them, were obscene.

Appellants, by this appeal, have not presented this fact issue of obscenity to this Court and, therefore, the only issue before this Court is the constitutionality of Missouri's statutory scheme for preventing the distribution of such obscene publications to her citizens.

It is submitted that this issue has already been decided by this Court, adversely to the claim of appellants, in the case of **Kingsley Books v. Brown,** 354 U.S. 436, 1 L. Ed. 2d 1469, 77 S. Ct. 1325.

The statutory scheme of the State of New York, approved by this Court in the **Kingsley** case, supra, and Missouri's statutory scheme are essentially similar. The differences are of degree not of kind, and the reasoning and authorities contained in the opinion of this Court in the Kingsley case require a holding that Missouri's statutory scheme is likewise constitutional.

Missouri's statutory scheme operates in rem—against the publications, whereas New York's statute operates in personam—against the seller. In New York a complaint is filed in court against the seller of allegedly obscene publications and a temporary injunction pendente lite restrains the seller from distributing such publications until the issue of obscenity is judicially determined by expeditious proceedings. If the publications are found by the court to be obscene, the seller is permanently enjoined from selling them (or other copies of the same publication which he may thereafter obtain), and he is required to deliver them up for destruction (or they will be seized and destroyed). Such judicial proceedings are not limited to one publication offered for sale by the seller, but one case may apply to any number of publications held for distribution by the seller. In the Kingsley case there were involved fourteen different booklets, under the general title of "Nights of Horror."

In Missouri a search warrant is issued by a court on complaint, if the court finds reasonable grounds for such complaint or the complaint is upon personal knowledge of the person who executes it (**Section 542.380**, R.S. Mo.

1949, and **Supreme Court Rule** 33.01). The search warrant directs the officer who executes it to seize the allegedly obscene publications in the hands of the seller and return the publications into court. Notice is given to the seller from whom the publications were seized and an expeditious judicial determination of the issue of obscenity is had. If the publications are found not to be obscene they are returned to the seller. If the publications are found to be obscene they are ordered destroyed or retained by the sheriff for use in evidence and then destroyed.

Missouri places no restrictions on the seller except that the particular publications seized under the search warrant are taken from his possession pending the expeditious judicial determination of the issue of obscenity. The seller is free to continue selling any other publications or copies that he may possess.

Neither New York nor Missouri exert any prior restraint on publication. Both act only after publication and in an attempt to stop distribution of obscenities and thus protect their citizens from the admitted evils flowing from such dissemination of obscene publications. Such evils have long and almost universally been recognized as is pointed out by this Court in **Roth v. United States,** 354 U.S. 476, 1 L. Ed. 2d 1498, 77 S. Ct. 1304, in connection with its specific holding that "obscenity is not within the area of constitutionally protected speech or press."

Thus, Missouri is attempting to protect its citizens from the evils attendant to the distribution of obscenity which is not constitutionally protected speech or press, and in doing so has adopted a statutory scheme which is not constitutionally different from that of New York approved by this Court in **Kingsley Books v. Brown**, supra.

It is, therefore, submitted that this case does not present a substantial federal question and that this Court should not retain jurisdiction of this appeal or that the decision of the Supreme Court of Missouri should be affirmed on the basis of the foregoing authorities.

II.

The Missouri statutes do not impose an unconstitutional prior restraint on freedom of speech or press.

In Point No. II of appellants' brief, it is contended that the Missouri statutes here in question impose an unconstitutional prior restraint on the freedom of speech or press. This position of appellants misconceives the attack of the statutes and the scope of the constitutional protection of speech and press. The Missouri statutes do not, in fact, provide any previous restraint. The statutes come into play only after the magazine, book, etc., has been published and has been introduced into a stream of commerce which leads to the ultimate recipient, i. e., the reader. There is no previous license or censorship or requirement for administrative approval before a publication may be published or distributed. The Missouri statutes merely operate to remove obscene matter from the stream of commerce before it can reach the reader and do its damage.

The First Amendment to the United States Constitution, as made applicable to the states through the Fourteenth Amendment to the United States Constitution, does not place an absolute prohibition upon all prior restraints. This is most graphically illustrated by the holding of this Court in the very recent case of **Times Film Corporation v. City of Chicago**, No. 34, October Term, 1960, decided January 23, 1961. It has repeatedly been held by this Court that the constitutional protection against prior restraint is

not absolute. See such cases as **Near v. Minnesota**, 283 U.S. 697, 75 L. Ed. 1357, 51 S. Ct. 625, and **Kingsley Books v. Brown**, 354 U.S. 436, 1 L. Ed. 2d 1469, 77 S. Ct. 1325. It has further been specifically held by this Court in **Roth v. United States**, 354 U.S. 476, 1 L. Ed. 2d 1498, 77 S. Ct. 1304, that obscene publications such as those with which we are dealing here are not within the area of constitutionally protected speech or press. This holding, of course, had been forecast by a long line of supreme court decisions beginning with **Near v. Minnesota**, 283 U.S. 697, 75 L. Ed. 1357, 51 S. Ct. 625.

In **Kingsley Books v. Brown**, 354 U.S. 436, 1 L. Ed. 2d 1469, 77 S. Ct. 1325, it was specifically pointed out that the law does not require a state to wait until the individual reader has received the obscene magazine and it has done its damage before the state can act to protect its citizens from the evils of pornography, obscenity, lewdness, and "filth for filth's sake." The state is not limited to proceeding only by criminal prosecution for the sale of obscene literature. It may by proper statutory procedure intervene to protect its citizens from the distribution of such obscenity.

In the case at bar the speech has already been spoken; the books, magazines, etc., have already been published. Missouri places no prior restraint on such speech or publication but only acts after such speech or publication, in an attempt to limit the dissemination thereof and protect its citizens from the damage done by such dissemination.

Appellants claim that a bookseller should have *the right* to circulate his material subject only to subsequent restraint by criminal prosecution. Appellants make the flat statement that the distributor has the right to distribute obscenity if he is willing to risk criminal prosecution and imprisonment therefor. It seems apparent from this

bold assertion that it is appellants' position that every individual in the chain of distribution of obscenity and pornography has an absolute right to be allowed to make their profit by selling such filth, and that the state is powerless to act until after they have made their profit and then the state may only act by criminal prosecution. Appellants contend that it is only after such obscene magazines have been sold to the ultimate consumer, that is, the individual reader, and they have performed their evil function that the state can act. Appellants would have this Court hold that the state is powerless to prevent the damage from such obscene literature, but that it must stand aside with hands tied until the damage has been done and then can move only by way of criminal prosecution. It is apparent from appellants' brief that the appellants think that it is economically profitable for them to run the risk of possible criminal prosecution in order to make their profits from the selling of obscene literature. It is respectfully and urgently submitted that the law does not thus render the state impotent to protect its citizens from the evils of obscenity, nor does the law clothe the purveyors of pornography with such a protective cloak to guarantee their profits. This Court has so held in **Kingsley Books v. Brown**, supra, and it is submitted that a like holding should result in the case at bar.

It should be pointed out that action by Missouri under the statutory scheme here in question affects only publications in being that are seized under the search warrant. It has no effect whatsoever upon any future publications or upon the activities of the bookseller except only as to his ability to sell the publications that have been seized.

The New York statutes approved by this Court in **Kingsley Books**, supra, provided for a temporary injunction against the selling of the publications in question

pending the judicial determination of the issue of obscenity. Appellants make some issue of the possibility of the seller continuing to sell under such injunction. It is submitted that this is not in fact in issue in the case at bar, and that there is no substantial difference from the injunction under the New York statute and the taking of the publications in question before the court and out of the possession of the seller under the Missouri statute. If anything, the New York statute is harsher because all of his interim actions are enjoined, whereas, the Missouri seller is only affected as to the particular copies of the publications which have been seized. He is free to continue selling other copies that he may possess or acquire. The Missouri statutes require a showing before a court will issue a search warrant for allegedly obscene matter. The New York procedure is commenced by complaint on the discretion of the officials named in the statute. The Missouri search warrants direct the person executing such warrant to seize obscene publications at the named place of business of the seller. The New York complaint is directed against the seller and the interim injunction prohibits him from selling any and all publications named, be that one or many. Both Missouri and New York provide for expeditious judicial determination of the issue of obscenity. The New York statute requires a hearing within one day and a decision within two days after the hearing. The Missouri statute requires a hearing not less than five days after seizure and not more than twenty. While there is a slight difference in timing, it is submitted that this difference is not of substance and, in fact, appellants make no complaint about this difference as to time.

Appellants complain that under the Missouri procedure the officer who executes the search warrant directing the seizure of obscene publications may seize a publication

which is not obscene. We are here dealing with the activities of human beings and there is, of course, always room for a mistake. Likewise, and with equal force, it could be said that under the New York statute the officials might complain against publications which were not in fact obscene and the seller thereof might be prohibited from selling such publications pending judicial determination of the issue of obscenity. It is, for this very reason, that judicial determination of the question of whether or not the publication is obscene is provided for by the statutes. If there were no possibility of complaining against in New York, or seizing in Missouri, a publication which was not obscene, there would be no need for a judicial hearing on the issue of obscenity. It is submitted that the Missouri procedure for judicial determination of the question of obscenity gives adequate protection to the constitutional rights of the seller in the same manner and to the same extent as was the case under the New York statutes approved by this Court in the **Kingsley** case.

Appellants complain that under the Missouri statute there could be indiscriminate seizure at the whim of any police officer, and that the officials of Missouri might in some other case seize the whole stock in trade of some bookseller because one book in such stock was possibly obscene. The answer to this, of course, is that this is not the case at bar. Further, action in Missouri is not taken at the whim of some police officer but is only taken after a showing is made to a court and the court determines that the circumstances justify the issuance of a search warrant; such search warrant does not authorize the seizure of all of the stock in trade of a bookseller but is limited specifically to those publications which are obscene, lewd, licentious, indecent or lascivious, or of an indecent, immoral or scandalous character. Thus, it appears that the Missouri statute

limits its force to those materials which are without the protection of the freedom of speech and press clause of the First Amendment of the United States Constitution, and that it accords the seller notice and hearing and complete satisfaction of the requirements of due process.

We are not here dealing with a threat of prosecution either with or without knowledge on the part of the defendant, as was condemned by this Court in **Smith v. California,** 361 U.S. 147, 4 L. Ed. 2d 205, 80 S. Ct. 215, or with any scheme designed to induce self-censorship. Likewise, there is no semblance of any requirements for licensing or censorship. The scope of the Missouri statute is strictly limited to operating upon the publications, themselves, which are thought to be obscene and an expeditious judicial determination of the question of obscenity is provided with full protection to the rights of the seller.

It is therefore submitted, on the authority of the foregoing, that the Missouri statutes do not impinge upon the constitutional protection of freedom of speech and press as found in the First Amendment to the United States Constitution and as made applicable to the state by the Fourteenth Amendment to the United States Constitution. It is, therefore, respectfully suggested that the decision of the Supreme Court of Missouri in this case should be affirmed.

III.

No constitutional right of appellants was infringed by the test for obscenity applied by the Missouri courts.

In Point No. III of appellants' brief it is complained that the trial court applied an unconstitutionally restricted test in making its determination that the magazines in question were, in fact, obscene. It is submitted that this issue is not before the court in the case at bar.

As has heretofore been pointed out, appellants have specifically refrained from presenting to this Court the issue as to whether or not the publications in question were, in fact, obscene. Under such circumstances the question of the test used by the trial court in determining the fact issue of obscenity is not before this Court.

Likewise, the question of the propriety of the test used by the trial court was not actually before the Supreme Court of Missouri. This case was submitted in the trial court to the Judge, sitting without a jury, and under said circumstances the Missouri Supreme Court reviewed the case de novo on both the law and the evidence. The Supreme Court of Missouri, as is graphically shown by its opinion, applied the test for obscenity as set out and approved by this Court in **Roth v. United States**, 354 U.S. 376, 1 L. Ed. 2d 1498, 77 S. Ct. 1304. The Missouri Supreme Court set out the test as follows: "whether to the average person, applying contemporary community standard, the dominant theme of the material taken as a whole appeals to prurient interests." On the basis of this test the Supreme Court of Missouri examined the exhibits which were before it and concluded, independently and apart from the action of the trial court, that they were in fact obscene. The Missouri Supreme Court pointed out that the opinion filed gratuitously by the trial court was in no way binding on the appellate court which reviewed on both questions of law and questions of fact. The appeal was from the judgment of the trial court, not from the trial court's opinion. The pertinent part of said judgment is as follows (R. 92, 93):

> "State's Exhibits listed and described in Schedule A attached hereto and made a part hereof, and all copies thereof before this Court pursuant to the oral stipulation of counsel heretofore entered into in open court on the 23rd day of October, 1957, are hereby declared to have been kept for the purpose of public sale, distri-

bution and circulation, and are further declared obscene, lewd, licentious, indecent, lascivious, immoral and scandalous within the meaning and intent of **Missouri Revised Statutes**, 1949, Section 542.380. Said exhibits, and all copies thereof before this Court, shall be retained by the Sheriff of Jackson County, Missouri, or by his deputies, as necessary evidence for the purpose of possible criminal prosecution or prosecutions, and, when such necessity no longer exists, said Sheriff, or his deputies, shall publicly destroy the same by burning within thirty days thereafter."

Thus, regardless of the test used by the trial court, the Supreme Court of Missouri applied the proper test and concluded that the publications in question were, in fact, obscene. If appellants' complaints as to the test used by the trial court were sustained appellants would apparently require the Supreme Court of Missouri to vacate the order of the trial court and remand the case to the trial court for the purpose of entering the exact same judgment as the trial court had already entered. Even if it be conceded for the purpose of argument that the test applied by the trial court was erroneous, the result reached by the trial court was correct as found by the Supreme Court of Missouri by applying correct tests for obscenity and, therefore, it would be a useless formality to reverse the holding of the trial court only to direct the trial court to again enter the same judgment.

Even if we were to consider on the merits the contentions of appellants attacking the test used by the trial court, such contentions are without merit. The Supreme Court of Missouri, in its opinion, pointed out that the trial court had, in fact, used proper tests for obscenity and that such tests conformed to the requirements of the opinion of this Court in **Roth v. United States**, supra.

Appellants contend that the trial court relied exclusively on **State v. Becker**, 364 Mo. 1079, 272 S.W.2d 238. This is not correct, the Becker case was only one of several citations of authority contained in the trial court's opinion. In any event, the Supreme Court of Missouri pointed out specifically that the test promulgated in the **Becker** case was found in the following language:

> "These questions have been considered and tested objectively as to the effect of these publications in their entirety, upon persons of average human instincts." (R. 110).

Thus, even if we assume that the gratuitous opinion of the trial court is in some way in issue on this appeal, the Supreme Court of Missouri has construed its previous opinion in the Becker case as setting forth a test for obscenity which meets all the requirements of the test approved by the Supreme Court of the United States in **Roth v. United States**, supra.

The real complaint of appellants seems to be that the trial court in its opinion did not use the exact language that was used by this Court in the **Roth** case, when speaking of the test to be used to determine the fact issue of obscenity.

It therefore appears that there is no substantive merit in appellants' complaint concerning the opinion of the trial court, and that such issue is not properly before this Court for consideration.

CONCLUSION.

It is, therefore, on the basis of the foregoing, respectfully submitted that the decision of the Supreme Court of Missouri should be in all things affirmed.

Respectfully submitted,

THOMAS F. EAGLETON,
Attorney General,
FRED L. HOWARD,
Assistant Attorney General,
JOHN C. BAUMAN,
Assistant Attorney General,
Supreme Court Building,
Jefferson City, Missouri,
Attorneys for Appellees.